No. 15-674

IN THE

Supreme Court of the United States

UNITED STATES, ET AL.,

Petitioners,

v.

STATE OF TEXAS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF FORMER FEDERAL IMMIGRATION AND HOMELAND SECURITY OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF THE UNITED STATES

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INTEREST OF AMICI CURIAE[1]

Amici served in senior positions in the federal agencies charged with enforcement of U.S. immigration laws under both Democratic and Republican administrations.

Roxana Bacon served as Chief Counsel of U.S. Citizenship and Immigration Services ("USCIS") from 2009 to 2011.

Bo Cooper served as General Counsel of the United States Immigration and Naturalization Service ("INS") from 1999 until 2003. INS is the predecessor agency to the federal offices within the Department of Homeland Security ("DHS") that now have responsibility for enforcing the nation's immigration laws.

Seth Grossman served as Chief of Staff to the General Counsel of DHS from 2010 to 2011, Deputy General Counsel of DHS from 2011 to 2013, and as Counselor to the Secretary at the same agency in 2013.

Stephen H. Legomsky served as Chief Counsel of USCIS from 2011 to 2013 and as Senior Counselor to the Secretary of DHS on immigration issues from July to October 2015.

John R. Sandweg served as Acting Director of Immigration and Customs Enforcement ("ICE")

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[1] Pursuant to Supreme Court Rule 37.2(a), this *amicus* brief is filed more than ten days before its due date, and all parties have consented to the filing of this brief. Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part, and no persons other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

from 2013 to 2014, as Acting General Counsel of DHS from 2012 to 2013, as Senior Counselor to the Secretary of DHS from 2010 to 2012, and as Chief of Staff to the General Counsel of the same agency from 2009 to 2010.

Paul Virtue served as General Counsel of INS from 1998 to 1999. He also served as Executive Associate Commissioner from 1997 until 1998 and Deputy General Counsel from 1988 until 1997.

As former leaders of the nation's primary immigration enforcement agencies, amici are familiar with the historical underpinnings of deferred action policies like those at issue in this litigation. Amici's experience also reveals the vital role that prosecutorial discretion plays in allowing for the rational enforcement of federal immigration law, which has historically established laudable policy objectives that have been backed with inadequate resources. Amici's experience reveals that restricting Executive discretion in the immigration context threatens the national security interests, humanitarian values, and rule of law principles underlying federal immigration legislation.

SUMMARY OF ARGUMENT

For more than half of a century, the Executive Branch has implemented policies designed to delay – in many cases indefinitely – the enforcement of deportation and other requirements created by federal immigration legislation. Administrations of both Republican and Democratic Presidents have relied on these policies to enforce federal immigration laws in a manner that is efficient, rational, and humane. While these policies have at times generated political controversy, their legal underpinnings

historically have not. That is because, as a general rule, "enforcement priorities are not the business of this Branch but of the Executive." *Chaney v. Heckler*, 718 F.2d 1174, 1192 (D.C. Cir. 1983) (Scalia, J., dissenting), *rev'd Heckler v. Chaney*, 470 U.S. 821, 833 (1985) (explaining that the ordering of enforcement priorities is a "special province of the Executive.").

The decision below threatens to upend policies and practices that have been relied upon by immigration officials since the Eisenhower Administration. Although the lawsuit that led to the decision below challenged the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program, that program is the same in its basic attributes as numerous deferred action programs that preceded it. As with DAPA, nearly all prior deferred action policies relied on prosecutorial discretion to focus enforcement on the highest priority cases consistent with federal immigration policy, and most applied to entire categories of persons, not simply individual cases. Also like DAPA, many of these previous programs included some form of eligibility for work authorization.

Executive discretion to establish enforcement policies is vitally important in the immigration context, where scarce resources are available to implement myriad federal immigration policies and where the selection of enforcement priorities has potentially severe consequences for national security, the employment market, and the preservation of family unity. That discretion is just as important, and just as lawful, when it is used to establish priorities that may affect large numbers of persons as it is when it affects only individual cases. Expedi-

tious review of the decision below is vital to ensure that immigration enforcement priorities are determined by the Executive Branch officials to whom discretion has been committed by Congress, rather than by judicial fiat.

ARGUMENT

I. DEFERRED ACTION POLICIES HAVE BEEN AN INTEGRAL COMPONENT OF IMMIGRATION ENFORCEMENT FOR DECADES

For more than half of a century, federal immigration officials have exercised enforcement discretion through policies that recommend "deferred action," "extended voluntary departure," "parole," or "deferred enforced departure" for various classes of aliens. Notwithstanding the variation in terminology, these programs are fundamentally alike; they all enable certain classes of otherwise deportable aliens to remain in (or, in the case of parole, to enter) the United States and, in most cases, to support themselves while they are present by working lawfully.

In 1956, President Eisenhower "paroled" – i.e., authorized the admission into the United States of – roughly one thousand foreign-born children adopted by American citizens overseas, but who were barred entry into the United States by statutory quotas. The President explained that he had been "particularly concerned over the hardship" that these quotas imposed, especially on members of the U.S. armed forces who were "forced to leave their adopted children behind" after completing tours of duty. After learning from the Attorney General and Secretary of State that "this can be

done," the President adopted the parole policy "pending action by Congress to amend the law." *See* President Dwight Eisenhower, *Statement Concerning the Entry into the United States of Adopted Foreign-Born Orphans* (Oct. 26, 1956) *available at* http://www.presidency.ucsb.edu/ws/?pid=10677.

As the Cold War entered its second decade, the Eisenhower Administration began to use the parole power as an instrument of foreign policy. For example, President Eisenhower ordered the parole of Cubans fleeing that country's oppressive communist regime – a program continued by the Kennedy, Johnson, and Nixon Administrations, and which ultimately permitted over six hundred thousand otherwise ineligible aliens to enter the United States. American Immigration Council, *Executive Grants of Temporary Immigration Relief, 1956-Present* (Oct. 2014).

The Ford and Carter Administrations each made grants of "extended voluntary departure," meaning that they "temporarily suspend[ed] enforcement" of the immigration laws for "particular group[s] of aliens." *Hotel & Rest. Employees Union, Local 25 v. Smith*, 846 F.2d 1499, 1510 (D.C. Cir. 1988) (en banc); Andorra Bruno et al., Congressional Research Serv., *Analysis of June 15, 2012 DHS Memorandum*, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (July 13, 2012).

The Reagan and George H.W. Bush Administrations continued and broadened deferred action. President Reagan's INS promulgated a regulation enabling beneficiaries of deferred action to apply for work authorization. 46 Fed. Reg. 25,080 (May 5,

1981). This regulation remains in effect and applies to present-day deferred action recipients. 8 C.F.R. § 274a.12(c)(14); *see also* 8 C.F.R. § 274a.12(a)(11) (allowing work authorization for aliens "whose enforced departure from the United States has been deferred").

In 1986, following passage of the Immigration Reform and Control Act (IRCA), Pub. L. No. 99-603, § 201, 100 Stat. 3359, 3445 (1986), the Reagan Administration also launched the "Family Fairness" Program. IRCA had established a pathway to lawful status for certain aliens who otherwise were illegally present in the United States, *see id.*, but the Act did not state whether INS should continue to deport the relatives of aliens who might qualify for lawful status under the new law, and, as discussed *infra* in Section III, the legislative history makes clear that the omission reflected a deliberate legislative decision to exclude these individuals. *See INS Reverses Family Fairness Policy*, 67 No. 6 Interpreter Releases 153 (Feb. 5, 1990) ("What to do when some but not all members of an alien family qualify for legalization has been a controversial issue since the beginning of the amnesty program."). Confronted with that question, INS Commissioner Alan Nelson acknowledged that there was "nothing in [IRCA or the legislative history] that would indicate Congress wanted to provide immigration benefits to others who didn't meet the basic criteria, including the families of legalized aliens." Alan C. Nelson, Comm'r, *Legalization and Family Fairness: An Analysis* (Oct. 21, 1987), *reprinted as* 64 No. 41 Interpreter Releases 1191, 1201 ("Nelson Statement"). INS therefore lacked express statutory au-

thority to grant resident status to aliens who did not qualify for it on their own merits. *Id.*

The fact that IRCA did not provide express statutory authority to INS to alter the status of nonqualifying aliens, however, did not mean that INS was legally required to deport all such persons or prohibited from granting them permission to work. The Reagan Administration recognized a distinction between granting individuals permanent resident status, which the Attorney General could not do without statutory authorization, and merely deferring removal actions against certain unlawfully present aliens, which the Attorney General was empowered to do by law. *Id.* As Commissioner Nelson stated:

> INS is exercising the Attorney General's discretion by allowing minor children to remain in the United States even though they do not qualify on their own, but whose parents (or single parent in the case of divorce or death of spouse) have qualified under the provisions of IRCA. The same discretion is to be exercised as well in other cases which have specific humanitarian considerations.

Id.

President George H.W. Bush's Administration expanded the Family Fairness Program in 1990, when INS Commissioner Gene McNary instructed that "[v]oluntary departure will be granted to the spouse and to unmarried children under 18 years of age, living with the legalized alien, who can establish" that they meet certain criteria, including resi-

dence in the United States for a specified period of time and the lack of a felony conviction. Memorandum from Gene McNary, Comm'r, to Reg'l Comm'rs, *Family Fairness* (Feb. 2, 1990), *reprinted as* 67 No. 6 Interpreter Releases 153, 165 App. I ("McNary Memo"). INS also made clear that aliens who qualified under the Family Fairness Program were eligible to work. *Id.* Contemporaneous government estimates indicated that as many as 1.5 million aliens were expected to be eligible under the expanded program. *See Immigration Act of 1989: Hearing before the Subcomm. On Immigration, Refugees, and International Law of the H. Comm. On the Judiciary* at 49, 101st Cong. (1990) (Mr. McCollum: "Do you have any idea, any estimates of how many people we are talking about who are the immediate relatives legalized under the IRCA Act? . . . ." Mr. McNary: "Well, we are talking about 1.5 million under IRCA."); *see also id.* at 56 (Mr. Morrison: "Mr. McNary, you used the number 1.5 million IRCA relatives who are undocumented but who are covered by your family fairness policy. Do I have that number right?" Mr. McNary: "Yes."). Publicly available estimates indicate that this figure equates to approximately 40% of undocumented aliens in the United States at the time. *See* Jeffrey S. Passel, et. al., *As Growth Stalls, Unauthorized Immigrant Population Becomes More Settled*, Pew Research Center (September 2014) *available at* http://www.pewhispanic.org/files/2014/09/2014-09-03_Unauthorized-Final.pdf (estimating that 3.5 million unauthorized immigrants lived in the United States in 1990).[2]

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[2] Although fewer people ultimately applied for Family Fairness than the Administration was predicting – largely be-

After overseeing this expansion of Family Fairness, President Bush issued a signing statement accompanying his approval of the Immigration Act of 1990. That Act gave the Attorney General power to grant "temporary protected status" to allow otherwise deportable aliens to remain in the United States "because of their particular nationality or region of foreign state of nationality." Pub. L. No. 101-649 § 302, 104 Stat. 4978 (1990). President Bush objected to language purporting to make this the "exclusive" avenue for providing such relief, stating: "I do not interpret this provision as detracting from any authority of the executive branch to exercise prosecutorial discretion in suitable immigration cases. Any attempt to do so would raise serious constitutional questions." *See* President George H.W. Bush, *Statement on Signing the Immigration Act of 1990* (Nov. 29, 1990) *available at* http://www.presidency.ucsb.edu/ws/?pid=19117.

More recent Administrations have continued to employ deferred action. For instance, President Clinton's Administration authorized deferred action for aliens who might prove eligible for permanent relief through the Violence Against Women Act. *See* Memorandum from Paul W. Virtue, Acting Executive Associate Commissioner, INS to Regional Directors et al., INS, *Supplemental Guidance on Bat-*

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cause the subsequently-enacted Immigration Act of 1990 offered preferable remedies – neither the Administration nor Congress viewed the anticipated scale of the program as undermining its legality. *See* Written Testimony of Stephen H. Legomsky before the Committee on the Judiciary, U.S. House of Representatives, at 24-25 (Feb. 25, 2015), http://judiciary.house.gov/_cache/files/fc3022e2-6e8d-403f-a19c-25bb77ddfb09/legomsky-testimony.pdf ("Legomsky Testimony").

tered Alien Self-Petitioning Process and Related Issues at 3 (May 6, 1997) ("Virtue Memo") (noting that "[b]y their nature, VAWA cases generally possess factors that warrant consideration for deferred action"). And President George W. Bush provided deferred action for foreign students affected by Hurricane Katrina who were unable to fulfill their F-1 visa full-time student requirement, and he simultaneously suspended employer verification requirements for those students, as well. USCIS, *Interim Relief for Certain Foreign Academic Students Adversely Affected by Hurricane Katrina, Frequently Asked Questions* (Nov. 25, 2005), *available at* http://www.uscis.gov/sites/default/files/files/pressrelease/F1Student_11_25_05_FAQ.pdf.

While these examples are by no means exhaustive, the consistency and frequency with which both Republican and Democratic Administrations have employed deferred action policies underscores the practice's importance to sound enforcement of federal immigration law. Amici have identified nearly forty examples of such policies, each of which is listed in the Appendix to this brief.

II. DEFERRED ACTION POLICIES ARE NECESSARY FOR THE EFFECTIVE ENFORCEMENT OF FEDERAL IMMIGRATION LAWS AND ADVANCE IMPORTANT POLICY OBJECTIVES

Over the past several decades, Administrations of both political parties have repeatedly defended deferred action policies by invoking straightforward and consistent legal and policy arguments. As Executive officials charged with enforcing U.S. immigration laws have explained, deferred action poli-

cies are necessary to make the most efficient use of limited enforcement resources, to promote humanitarian and family values, and to achieve consistent enforcement of federal immigration law.

A. Deferred Action Policies Are Necessary To Make The Most Efficient Use Of Limited Enforcement Resources

Like numerous other exercises of prosecutorial discretion in the immigration context, DAPA responds to the reality that Congress has not allocated to DHS sufficient resources to remove every person who has violated our nation's immigration laws. *Compare* Memorandum from Jeh C. Johnson, Sec'y of Homeland Security, to Leon Rodriguez, Dir., USCIS, et al., *Exercising Prosecutorial Discretion*, at 2 (Nov. 20, 2014), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf ("DAPA Memo") ("Due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States.") *with* Memorandum from Sam Bernsen, to Comm'r, *Legal Opinion Regarding Service Exercise of Prosecutorial Discretion* at 1 (Jul. 15, 1976) ("Bernsen Memo") ("There simply are not enough resources to enforce all of the rules and regulations presently on the books. As a practical matter, therefore, law enforcement officials have to make policy choices as to the most effective and desirable way in which to deploy their limited resources.") *and* Memorandum from B. Cooper, INS General Counsel, to Comm'r, *INS Exercise of Prosecutorial Discretion* at 2 (July 11, 2000) ("Cooper Memo") ("[L]imitations in available enforcement resources . . . make it impossible for a law enforcement agency

to prosecute all offenses that come to its attention.").

Resource constraints require senior immigration officials to decide how funding and personnel can be deployed in the manner most likely to advance the policy objectives enshrined in a variety of federal immigration laws. As described in Part I, *supra*, the Executive Branch for decades has been required to prioritize enforcement objectives, in a manner similar to DAPA, and it has consistently and successfully defended the legality of such actions. In 1984, the Reagan Administration set forth a compelling case for deference to the Executive's exercise of prosecutorial discretion:

> In deciding whether to undertake enforcement action, an agency must do far more than merely determine whether there is a sound factual and legal basis for proceeding. The agency must decide which enforcement strategy will best carry out its statutory mandate and must decide how to allocate its scarce resources. It must compare the importance and cost of various potential cases, as well as the likelihood of success in each of those endeavors. . . . After considering these and other factors, an agency may rationally decide to pursue highly visible cases. Or it may decide to undertake action in a much larger number of cases. Evaluating the relevant factors and developing a sound enforcement strategy are quintessentially the functions of a regulatory agency. They are

not appropriate for judicial review.

Brief for United States as Petitioner, *Heckler v. Chaney*, No. 83-1878, 1984 WL 565477, *17-18 (U.S. Aug. 16, 1984).

The legal reasoning embraced by prior Administrations is equally applicable to DAPA. Like its predecessor deferred action policies, DAPA reflects the Executive's determination that enforcement of the immigration laws will be most effective if the government's limited resources are used to prosecute individuals who pose the greatest threats to public safety instead of those who do not pose such threats, who belong to families residing in the United States, and who have developed strong ties to this country and to their communities.

DAPA employs the same type of enforcement strategy that Congress has authorized the Executive to make for decades. As early as 1909, a DOJ circular advised officers not to proceed in immigration cases unless "some substantial results are to be achieved thereby in the way of betterment of the citizenship of the country." *See* U.S. Dep't of Justice, Circular Letter No. 107 (Sep. 20, 1909) (quoted in Bernsen Memo at 4). The current deferred action policies reflect a similar judgment – here, deferred action is necessary to ensure that limited funding and personnel will be directed toward cases that have the greatest impact on national security and public safety. *Compare* Memorandum from Janet Napolitano, Sec'y of Homeland Security, to David V. Aguilar et al., *Exercising Prosecutorial Discretion* at 1 (Jun. 15, 2012) ("[A]dditional measures are necessary to ensure that our enforcement resources are not expended on these low priority cases but are

instead appropriately focused on people who meet our enforcement priorities.") *with* Memorandum from Doris Meissner, Immigration & Naturalization Serv. Comm'r, to Reg'l Dirs. et al., *Exercising Prosecutorial Discretion*, at 4 (Nov. 17, 2000), *reprinted as* 77 No. 46 Interpreter Releases 1661, App. I ("Meissner Memo") ("Like all law enforcement agencies, the INS has finite resources, and it is not possible to investigate and prosecute all immigration violations. The INS historically has responded to this limitation by setting priorities in order to achieve a variety of goals. These goals include protecting public safety, promoting the integrity of the legal immigration system, and deterring violations of the immigration law. . . . An agency's focus on maximizing its impact under appropriate principles, rather than devoting resources to cases that will do less to advance these overall interests, is a crucial element in effective law enforcement management.").

The need for deliberate resource management and prioritization has grown more acute as increasingly sophisticated threats to the homeland have emerged, and thus the number of potential targets for enforcement actions has surged. In the years after the September 11, 2001, terrorist attacks, the Principal Legal Advisor of ICE under President George W. Bush urged that "we must prioritize our cases to allow us to place greatest emphasis on our national security and criminal alien dockets." Memorandum from William J. Howard, Principal Legal Advisor, ICE, to All OPLA Chief Counsel, *Prosecutorial Discretion*, at 8 (Oct. 24, 2005) ("Howard Memo"). He elaborated:

> It is clearly DHS policy that national security violators, human rights abusers, spies, traffickers in both narcotics and people, sexual predators and other criminals are removal priorities. It is wise to remember that cases that do not fall within these categories sometimes require that we balance the cost of an action versus the value of the result. Our reasoned determination in making prosecutorial discretion decisions can be a significant benefit to the efficiency and fairness of the removal process.

Id.

Deferred action policies advance homeland security and public safety objectives by drawing the recipients out of the shadows and into the open. These individuals provide their names, addresses, and histories, and the government performs background checks to assure public safety. Communities are safer when undocumented immigrants who are either victims of crimes or witnesses to crimes feel secure enough to report the crimes to the police rather than avoid contact for fear of being deported. *See* Legomsky Testimony at 29. DAPA, which reflects this Administration's decision "to prioritize threats to national security, public safety, and border security," is consistent with this approach. *See* DAPA Memo at 3.

B. Deferred Action Policies Are Necessary To Promote Humanitarian Values

Sound enforcement of the immigration laws requires attention to the humanitarian policy objective of promoting family unity. As Gene McNary, the INS Commissioner under President George H.W. Bush, explained: "It is vital that we enforce the law against illegal entry. However, we can enforce the law humanely. To split families encourages further violations of the law as they reunite." *INS Reverses Family Fairness Policy*, 67 No. 6 Interpreter Releases 153 (Feb. 5, 1990).

Immigration officials at all levels have been called upon for decades to exercise prosecutorial discretion in a manner that is faithful to the rule of law without sacrificing the preservation of, and respect for, family units to the greatest extent practicable. *See, e.g.*, Memorandum from Julie L. Myers, Assistant Secretary of Homeland Security, to All Field Office Dirs. And Special Agents in Charge of U.S. Immigration and Customs Enforcement, *Prosecutorial and Custody Discretion*, at 1 (Nov. 7, 2007) ("Myers Memo") (discussing treatment of nursing mothers and stating that "[f]ield agents and officers are not only authorized by law to exercise discretion within the authority of the agency, but are expected to do so in a judicious manner at all stages of the enforcement process"); *see also* Nelson Statement at 1200 (referencing "our family-oriented immigration policy"). The Family Fairness Program, discussed *supra*, is one salient example of how federal immigration policy has attempted to avoid doing unnecessary harm to family unity.

DAPA's aim of preserving family unity is not new, but rather is consistent with the policy objectives that have guided federal immigration enforcement efforts for decades. *See, e.g.*, DAPA Memo at 3 (explaining that aliens who "commit serious crimes or otherwise become enforcement priorities" are ineligible). Amici's experience demonstrates that the best approach to achieving rational and effective enforcement of our immigration laws is to prioritize threats to public safety and national security, while simultaneously demonstrating compassion for families whose members pose no substantial risks and who have developed ties to the communities in which they live.

C. Deferred Action Policies Are Necessary To Achieve Consistent Enforcement of Federal Immigration Law

The U.S. immigration system depends on the dedicated efforts of tens of thousands of federal employees – from border patrol agents and career prosecutors to the Attorney General and the Secretary of Homeland Security. These employees are frequently called upon to make important decisions that shape the implementation and enforcement of the law, the security of the nation, the safety of the public, and the future of families. *See* Cooper Memo at 3 ("[INS] exercises prosecutorial discretion thousands of times every day.").

Policy statements setting forth the Administration's enforcement priorities are necessary to coordinate these efforts in service of a common objective, namely, "to establish a reasonable, fair, orderly, and secure system of immigration into this country and not to discriminate in any way against par-

ticular nations or people." President Ronald Reagan, Statement on Signing the Immigration Reform and Control Act of 1986 (Nov. 6, 1986). Amici's experience is that policy statements like DAPA are necessary to avoid having the U.S. immigration system treat similarly situated aliens differently based solely on happenstance.

Policy statements that guide enforcement discretion have played an important role in promoting consistency in the treatment of individuals in the immigration system. When the Family Fairness Program was created, the INS Commissioner explained that a policy statement was necessary "to assure uniformity in the granting of voluntary departure and work authorization for the ineligible spouses and children of legalized aliens." McNary Memo at 164. Senior officials in subsequent Administrations have similarly noted the importance of deferred action policy statements as an effective tool to promote uniformity and consistency in the enforcement of the law. *See, e.g.*, Meissner Memo at 2 ("A statement of principles concerning discretion . . . contribute[s] to more effective management of the Government's limited prosecutorial resources by promoting greater consistency among the prosecutorial activities of different offices[.]"); Howard Memo at 3 ("[I]t is important that we all apply sound principles of prosecutorial discretion, uniformly throughout our offices and in all of our cases, to ensure that the cases we litigate on behalf of the United States, whether at the administrative level or in the federal courts, are truly worth litigating"); Cooper Memo at 8 ("[A]ppropriate policy guidance, reinforced by training, is necessary in order for a law enforcement agency to carry out an

enforcement function properly. Such guidance serves a variety of policy goals, including promoting public confidence in the fairness and consistency of the agency's enforcement action[.]").

III. THE FIFTH CIRCUIT'S DECISION UNDERMINES THE EXECUTIVE'S LONGSTANDING AUTHORITY TO ADOPT DEFERRED ACTION POLICIES

In its most fundamental respects, DAPA is indistinguishable from previous Administrations' exercise of prosecutorial discretion to defer removal proceedings with respect to certain aliens. In concluding that the Executive was without legal authority to implement DAPA – or that it was required to engage in notice-and-comment procedures before doing so – the Court of Appeals' opinion casts doubt upon this longstanding practice and threatens the Executive's ability to enforce the law in a manner that is efficient, consistent, and humane.

The Court of Appeals erroneously concluded that "previous deferred action programs are not analogous to DAPA," but it failed to articulate a legally significant distinction between DAPA and previous deferred action policies. *See Texas v. United States*, No. 15-40238, 2015 WL 6873190, at *24-25 (5th Cir. Nov. 9, 2015); *cf. Texas v. United States*, 86 F. Supp. 3d 591, 663 (S.D. Tex. 2015) ("The Court need not decide the similarities or differences between this action and past ones, however, because past Executive practice does not bear directly on the legality of what is now before the Court."). Each of the court's arguments distinguishing DAPA from prior policies fails to withstand scrutiny.

First, the Court of Appeals concluded that DAPA was different from the Family Fairness Program because the latter was "interstitial to a statutory legalization scheme," and because Congress has "repeatedly declined" to enact the DREAM Act, "features of which closely resemble DACA and DAPA." *Texas*, 2015 WL 6873190, at *25. But that is no different from the Reagan and George H.W. Bush Administrations' Family Fairness Program, which provided relief from deportation to a class of aliens – spouses and children of those eligible for legalization – that Congress had expressly *declined* to protect in IRCA. The Senate Judiciary Committee Report accompanying that legislation stated that "the families of legalized aliens will obtain no special petitioning right by virtue of the legalization" and "will be required to 'wait in line.'" S. Rep. No. 99-132, 99th Cong., 1st Sess. 343 (1985); *see also* Nelson Statement at 1201 (quoting the Committee Report as "clear" evidence that Congress did not intend to extend legalization programs to family members of those eligible). It is true that Congress eventually authorized deferred departure for family members of aliens eligible for legalization, Immigration Act of 1990, Pub. L. No. 101-649, § 301, 104 Stat. 4978, but that was not until after President Reagan's Administration launched the program and President George H.W. Bush's Administration expanded it. As with DAPA, similar legislation had been introduced and rejected at the time that Family Fairness was implemented. *See, e.g.*, Cong. Rec. 26883, 100th Cong (Oct. 7, 1987) (voting to "table" an amendment to an unrelated bill which would have provided a spouses and children excluded from IRCA a path to legalization, just a few weeks before the Reagan Administration's Family Fair-

ness Program). Thus, far from an exercise in mere gap-filling, the Family Fairness Program, like DAPA, made use of the broad enforcement discretion accorded to the Executive to enforce the immigration laws.

Second, the Court of Appeals concluded that DAPA did not "genuinely leave the agency and its employees free to exercise discretion." *Texas*, 2015 WL 6873190, at *20. But DAPA is no different from prior deferred action programs, which have included provisions similar to DAPA's requirement regarding case-by-case discretion. *See, e.g.*, Virtue Memo at 3; USCIS, Press Release, *USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina* at 1 (Nov. 25, 2005), *available at* http://www.uscis.gov/sites/default/files/files/pressrelease/F1Student_11_25_05_PR.pdf. Contrary to the Court of Appeals' assumption, these provisions are meaningful on paper and in practice. Amici's experience overseeing and implementing past deferred action programs confirms that case-by-case discretion is indeed exercised within broad categories of individuals designated for relief.

Third, the Court of Appeals concluded that DAPA operated more like a non-discretionary rule, subject to notice-and-comment requirements, than a policy statement. *Texas*, 2015 WL 6873190, at *18-22. But previous deferred action programs, including Family Fairness, were similarly structured, and yet were also implemented without notice-and-comment rulemaking. *See, e.g.*, McNary Memo at 164 (directing officials to grant relief to eligible applicants without reference to case-by-case evaluation).

Fourth, the Court of Appeals distinguished between DAPA and country-specific deferred action programs, which are usually adopted in "response to war, civil unrest, or natural disaster." *Texas*, 2015 WL 6873190, at *24. But the court's views regarding which type of programs are most salutary or most important are legally irrelevant. This Court has held that the selection of criteria for an enforcement agenda is an executive, rather than a judicial, function. *See Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 483-84 (1999); *see also Chaney*, 718 F.2d at 1192 (Scalia, J. dissenting); Brief for United States as Petitioner, *Heckler v. Chaney*, No. 83-1878, 1984 WL 565477, *18 (U.S. Aug. 16, 1984). While events abroad are one important reason for deferred action, they are certainly not the only valid reason.

Fifth, the Court of Appeals stated that "many of the previous programs were bridges from one legal status to another, whereas DAPA awards lawful presence to persons who have never had a legal status and may never have one." *Texas*, 2015 WL 6873190, at *24. But many prior deferred action policies did grant relief to individuals who had never had any form of legal status and who otherwise might never have obtained lawful presence. *See supra*, Part I.

The Court of Appeals failed to engage meaningfully with the realities of historical practice, or to articulate any limiting principle for the rule it adopted. Thus, the Fifth Circuit's opinion undermines the legal basis for numerous forms of deferred action that have been consistently relied upon by the Executive Branch for decades. Review in this Court is necessary to restore to the Executive

Branch the discretion that Congress has rationally vested in it, and thereby ensure that the federal immigration laws can be enforced without resort to inappropriate judicial intervention.

CONCLUSION

Amici respectfully urge this Court to grant the Writ of Certiorari.

Respectfully submitted,

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APPENDIX[3]

Year	Type of Action	Class of Aliens	No. Affected	Comments
1956	Parole	Orphans adopted by U.S. citizens abroad	923	Legislation was pending
1956 -72	Extended voluntary departure (EVD)	"Third preference" visa petitioners	Unknown	*See U.S. ex rel. Parco v. Morris*, 426 F. Supp. 976, 979-80 (E.D. Pa. 1977)
1956 -58	Parole	Hungarians	31,915	
1959 -72	Parole	Cubans	621,403	
1962 -65	Parole	Chinese nationals	15,100	
1975 -79	Parole	Vietnamese, Cambodians, and Laotians of Indochinese ancestry	Nearly 360,000	Ten separate authorizations were granted
1976	EVD	Lebanese	Unknown	

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[3] Sources: CRS Report, *supra*; Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, Memorandum Opinion for the Secretary of Homeland Security and the Counsel to the President, *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others* (Nov. 19, 2014); American Immigration Counsel, *Executive Grants of Temporary Immigration Relief, 1956-Present* (Oct. 2014).

1977	Suspended deportation	"*Silva* letterholders" who had sued the State Department for incorrectly calculating visa cap	250,000	All individuals represented in the class action were granted stays and permitted to apply for employment authorization
1977	EVD	Ethiopians	At least 15,000	Policy extended in 1982
1977 -80	Parole	Soviet Union nationals	Over 50,000	Issued after statutory cap on conditional entries was met
1978	EVD	Ugandans	Unknown	
1978	EVD	Nurses	Unknown	43 Fed. Reg. 2776
1979	EVD	Nicaraguans	3,600	
1979	EVD	Iranians	Unknown	
1980	EVD	Afghans	Unknown	
1981 1987	EVD	Polish nationals	7,000	Extended in 1984 and 1987
1987	AG directed INS to refrain from deportation and to grant work authorization	Nicaraguans who could demonstrate a "well-founded fear of persecution"	150,000 - 200,000	Legislation was pending

1987	Indefinite voluntary departure	Children and spouses (with compelling humanitarian circumstances) of aliens eligible for legalization under IRCA ("Family Fairness")	Over 100,000 families	Nelson Statement; *see also* discussion above
1989	Deferred action	Chinese nationals	80,000	Provided work authorization
1990	Deferred Enforced Departure (DED)	Chinese nationals and their dependents	80,000	Provided work authorization
1990	Voluntary departure	All spouses and children of aliens eligible for legalization under IRCA ("Family Fairness")	1.5 million	McNary Memo; *see also* discussion above
1991	DED	Persian Gulf nationals	2,227	
1992	DED	El Salvadorans w	190,000	Issued after expiration of legislative grant of temporary protected status.
1997	DED	Haitians	40,000	Legislation was pending

1997	Deferred action	VAWA beneficiaries	Unknown	Virtue Memo
1998	Temporarily suspended deportation	El Salvadorans, Guatemalans, Hondurans, and Nicaraguans	150,000	Hurricane Mitch
1999	DED	Liberians	10,000	Issued after expiration of legislative grant of temporary protected status
2001-02	Parole, deferred action, and stays of removal	"T" and "U" Visa applicants	Unknown	
2005	Deferred Action	Students affected by Hurricane Katrina	Unknown	Employer verification rules suspended; Legislation was pending
2007	DED	Liberians	10,000	Issued after expiration of legislative grant of temporary protected status
2007	Prosecutorial discretion	Nursing mothers	Unknown	Myers Memo
2009	DED	Liberians	Unknown	

2009	Extended deferred action	Foreign born spouses and children under the age of 21 of United States citizens who had died.	Unknown	Memorandum from Donald Neufeld, Acting Associate Director, USCIS, to Field Leadership, USCIS, *Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children* (Sept. 4, 2009)
2010	Parole	Haitian orphans in the process of being adopted	Unknown	Haitian earthquake
2011	Deferred action	Victims of human trafficking and sexual exploitation	Unknown	
2011	DED	Liberians	3,600	
2012	Deferred action	Foreign born individuals who entered the United States before their 16th birthday and were under the age of 31 as of June 2012	Up to 1.8 million	Legislation was pending in Congress (i.e. the Dream Act); provided for a two-year renewable reprieve from deportation and work authorization